APPENDIX I

Docket No. 43292—Agenda 3—January, 1973.

In re HARRY PORCYNALEK HUTUL, Attorney, Respondent.

MR. JUSTICE DAVIS delivered the opinion of the court:

This is a disciplinary proceeding against the respondent under Supreme Court Rule 751 (Ill. Rev. Stat. 1967, ch. 110A, par. 751), wherein the sole meritorious issue is the measure of discipline to be imposed.

The cause comes before us on the report of the Grievance Committee of the Chicago Bar Association, which recommended that the respondent be disbarred, and the respondent's objections thereto. After a hearing on this report, the Board of Managers of the Chicago Bar Association, sitting as Commissioners, overruled the objections, approved the report and recommendation, and made its report to this court.

The recommendation was a consequence of the respondent's conviction in the United States District Court for the Northern District of Illinois, after a jury trial, on 9 of 15 counts charging him with specific acts of defrauding various insurance companies through use of the mails, and upon one count of conspiracy, in violation of sections 1341 and 371 of Title 18 of the United States Code.

The respondent was sentenced to concurrent prison terms of five years on each count on which he was convicted. The judgments of conviction were affirmed by the United

States Court of Appeals for the 7th Circuit (*United States* v. *Hutul*, 416 F.2d 607), and petition for *certiorari* was denied (396 U.S. 1012, 24 L. Ed.2d 504, 90 S. Ct. 573). Prior to his conviction in the United States District Court, he previously had been indicted and prosecuted by the State of Illinois, in the circuit court of Cook County, on substantially the same charges, and had been found not guilty.

The complaint of the Committee on Inquiry of the Chicago Bar Association against him recited his conviction in the United States District Court on the mail-fraud and conspiracy charges. After several hearings, Division IV of the Grievance Committee filed its report finding that the respondent had brought the legal profession into disrepute and recommended his disbarment. He filed objections to this report and filed a motion in this court to strike his name from the roll of attorneys. The clerk of this court, upon our suggestion, advised the Chicago Bar Association of the filing of this motion and requested its response. The Association advised us that a final hearing was scheduled before the full Grievance Committee and asked that the respondent's motion be continued so that proper consideration could be given to his request. The full Grievance Committee, sitting as Commissioners of this court, met on the scheduled date and without the respondent's appearance approved the report and the recommendation of disbarment.

Thereupon, the Chicago Bar Association filed with the clerk of this court certain "Suggestions to the Court" which described what had happened and suggested that the respondent's motion be held in abeyance pending receipt of the final report of the Board of Managers of the Association, which report was subsequently received.

Thereafter, *amicus curiae* filed a motion with the court to approve and confirm the report of the Commissioners recommending the respondent's disbarment. While incarcerated in the Federal Correctional Institution at Sandstone, Minnesota, the respondent wrote to the court and requested that his letter be considered as his objections to the Commissioners' report, and that the matter be stayed until his release from Federal custody. We allowed his request and continued the motion of *amicus curiae* to approve and confirm the Commissioners' report.

Upon the respondent's release on parole from Federal custody, his matter was reactivated. In addition to his letter of objections, the respondent later filed, on his own behalf, the common-law record of the circuit court of Cook County in the criminal case wherein he was found not guilty of the fraud and conspiracy charges; a copy of his letter to the Hon. William J. Lynch, Judge of the United States District Court, who presided in the proceeding wherein he was found guilty of mail fraud and conspiracy; and a copy of his petition for a writ of *certiorari* to the United States Supreme Court, which has now been denied.

The respondent has two basic objections to the report. First, he claims that he was placed in double jeopardy by the Federal prosecution which occurred after he had been found not guilty in a State prosecution for similar charges, and contends that this constitutes a violation of his rights under the fifth amendment to the United States constitution. He additionally urges that if the second prosecution was not barred by double jeopardy, it was barred by the principles of collateral estoppel or *res judicata*, and by the seventh amendment.

This identical argument was made by the respondent in his appeal to the United States Court of Appeals for the

7th Circuit (*United States* v. *Hutul,* 416 F.2d 607). In answering this contention, we adopt that part of the decision of that court which, at page 626 states:

> "First, the principles of res judicata and collateral estoppel act as a bar to subsequent proceedings only when the parties to each action are the same, and the Federal Government is neither the same as nor in privity with that of the State of Illinois. See United States v. Wapnick, 198 F. Supp. 359 (D.C.E.D. N.Y. 1961), aff'd. per curiam, 315 F.2d 96, cert. den. 374 U.S. 829, 83 S. Ct. 1868, 10 L. Ed. 2d 1052; Rios v. United States, 256 F.2d 173 (9th Cir. 1958). Therefore, the principles of res judicata and collateral estoppel do not apply to the case at bar, and do not provide a substitute for a defense of double jeopardy.
>
> Second, the Seventh Amendment is inapplicable to the instant case since it applies only to civil suits, not criminal.
>
> Finally, we reject defendant Hutul's contention that his prosecution was without Government authority and therefore void."

Also see: *One Lot Stones* v. *United States* (1972), ... U.S. ....., 34 L. Ed. 2d 438, 93 S. Ct. 489; *Abbate* v. *United States* (1959), 359 U.S. 187, 3 L. Ed. 2d 729, 79 S. Ct. 666. We, therefore, find that the respondent's contention in this regard is without merit.

The respondent next asserts that the disciplinary penalty of disbarment recommended by the Board of Managers is unjustifiably severe when considered in the light of his experiences in twice defending himself against the charges on which he was ultimately convicted, and particularly because his first defense thereto in the circuit court of Cook County was successful. He has maintained throughout the criminal proceedings that he was innocent of the

charges brought against him, and has continued to do so in this disciplinary proceeding. He has asked this court, in measuring the discipline to be imposed, to look behind his conviction, into his conduct and the facts and circumstances which led to the charges brought against him in his two trials. He urges, either as grounds for disapproval of the Commissioners' report or in mitigation of the discipline to be imposed, that we consider that he was originally found not guilty in the State court and suffered the attendant difficulties of such experience, as well as the exposure to the accompanying adverse publicity of that trial and his subsequent Federal trial and conviction; and that he was released on parole after serving only 21 days more than the minimum Federal sentence. We are not without compassion for the respondent because of the distressing situation which engulfs him, but we cannot overlook the fact that his burdened circumstances and his conviction were the inevitable consequence of his own deeds.

We recognize that while the respondent's conviction is conclusive evidence of his guilt (*In re Fumo*, (1972), 52 Ill.2d 307, 309), it does not preclude consideration of other evidence for the purpose of determining the appropriate disciplinary action. (*In re Fumo* (1972), 52 Ill.2d 307, 310; *In re Crane* (1961), 23 Ill.2d 398, 401-402.) The matters to be considered by the court in a disciplinary proceeding were delineated in the case of *In re Crane* (1961), 23 Ill.2d 398, 400-401, as follows:

> "While the conviction is conclusive evidence of guilt, it does not preclude the consideration of other evidence for the purpose of determining the appropriate disciplinary action. After all, a respondent is being disciplined not because of his conviction but because of his conduct. The actual conduct itself is certainly relevant to a determination of the appropriate discipline to be accorded. Just as every conviction of a

> crime does not require the same punishment, so all convictions of crimes involving moral turpitude do not require the same discipline. Thus, a consideration of the actual conduct of the respondent is not only proper, but may be indispensable, to an informed appraisal of the appropriate disciplinary action."

Therefore, we have considered the conduct of the respondent which resulted in his conviction, as well as the other factors which he has called to our attention.

The respondent was convicted by a jury in the United States District Court of defrauding various insurance companies through the use of the mails, and for conspiring to do so. The proof showed that the frauds occurred as a result of the respondent joining with several other individuals—purported clients—in collecting claims for lost wages allegedly incurred as a consequence of injuries sustained in six fictitious automobile "accidents." The mails were used to transmit proof of damages to the insurance companies involved. Again, we may appropriately refer to the opinion of the United States Court of Appeals, at pages 615 and 616, in describing the respondent's conduct:

> "This defendant served as attorney for all claimants in each accident. He knew Lombardi and Basan, yet represented them as claimants in accident No. 2, where they assumed the names of Victor Gattling and Burton Orwitz respectively. Similarly, Hutul knew Mitchell, yet represented her as Laura Young and Basan as Herbert Schwerlin in accident No. 1. Hutul's involvement in the accidents, his representations as to the identity and employment of the claimants, and his presence during various interviews and depositions are adequately recited in the summary of the accidents.
>
> Moreover, Hutul was intimately connected with Sacks and White Vending Company and admitted

knowing that Leonard Anglin, in accident No. 6, was the name of Sacks' brother-in-law and that the address given for Anglin was Sacks'. Hutul also know that the address given for John Lenard in accidents No. 5 and No. 6 was Sacks'. Hutul represented numerous claimants as employees of White Vending in 1959 and sued two other alleged White employees that year; yet he helped Sacks answer an interrogatory in 1961 which stated that White employed only four people in 1959.

Hutul's claim of innocent reliance on the representation made by the 'employers' on the lost wages statements allegedly mailed by him to them was disproven at trial. Two of the alleged employers, Ralph Losito (accident No. 2) and the Ioscos (accident No. 1), testified that they never received any correspondence from Hutul regarding the accidents. This is in addition to the fact that Hutul personally knew many of the alias claimants. The obvious conclusion is that Hutul never sent the statements to the alleged 'employers' but either filled them out himself or in cooperation with the other parties to the conspiracy."

Thus, it is clear that respondent's conduct in this series of frauds upon insurance companies, which resulted in the payment of substantial sums of money to him and his "clients," was calculated, knowing and deliberate. His insistence upon his innocence in the face of the evidence adduced at his trial in the United States District Court strains the credibility of this court.

In a recent and similar series of frauds brought to our attention in a disciplinary proceeding, which also involved a conviction under section 1341 of Title 18 of the United States Code, we found disbarment to be the appropriate disciplinary penalty. (*In re Fumo* (1972), 52 Ill.2d 307.) We find no reason to alter that penalty in this case.

Therefore, the findings and report of the Commissioners is approved and the respondent's name is stricken from the roll of attorneys of this court.

Respondent disbarred.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

(Certificate of Clerk, Justin Taft, with signature and seal of the Supreme Court in Springfield, Illinois, affixed thereto).

APPENDIX II

RULE 751. PROCEEDING TO STRIKE ATTORNEY'S NAME FROM ROLL

(a) The Board of Governors and its existing Committee on Grievances, and their successors as such, of the Illinois State Bar Association, and the Board of Managers and its existing Committee on Grievances, and their successors as such, of the Chicago Bar Association, are hereby appointed as Commissioners of the Supreme Court and are empowered and charged to make investigations from time to time, as may be necessary, concerning practices of attorneys at law which tend to defeat the administration of justice or to bring the courts and the legal profession into disrepute. To this end, these commissioners are further empowered and charged to receive, entertain, inquire into, and take proof concerning complaints against attorneys at law of this State, and may call to their assistance in such inquiries other members of the bar or bar associations of the State, may make all necessary rules and regulations concerning the conduct of such inquiries, and may themselves, or by such committees as they may designate, take the evidence of witnesses, as hereinafter provided.

(b) No complaint against an attorney at law shall be entertained unless it is signed by the person or persons aggrieved or by the president and secretary of a regularly organized bar association or by the chairman of a regularly appointed committee of the Chicago or Illinois State Bar associations and unless it is sufficiently clear and specific in its charges as reasonably to inform said attorney at law of the acts of misconduct he is claimed to have committed.

(c) When a member of the bar, designated by the Board of Governors of the Illinois State Bar Association or the Board of Managers of the Chicago Bar Association so to do, shall file in the office of the clerk of the Supreme Court an affidavit showing that any respondent resides or has gone out of this State or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and stating the place of residence of such respondent, if known or, that upon diligent inquiry his place of residence cannot be ascertained, and stating his last known place of residence, the clerk of the Supreme Court shall cause publication to be made in some newspaper of general circulation published in the county of respondent's place of residence or last known place of residence in this State, as set forth in such affidavit, containing notice of the pendency of the proceeding, the names of the complainant and the respondent, the title of this court and that of the commissioners of the court (the members of the Board of Governors and Committee on Grievances of the Illinois State Bar Association or of the Board of Managers and the Committee on Grievances of the Chicago Bar Association, as the case may be) and the time and place of the hearing of the case. He shall also within ten days from the first publication of such notice send a copy thereof by mail, addressed to such respondent whose residence or last known place of residence is stated in such affidavit. The certificate of the clerk that he has sent such copy in pursuance of this provision shall be evidence. Such notice shall be published for 3 consecutive weeks, the first insertion of which shall be at least 30 days before the date upon which the said cause shall be set for hearing by the commissioners; and unless said time has intervened no proceedings therein shall be had, but the said cause shall stand continued to a date at least 30 days after the said first date set for hear-

ing, provided, that in case the respondent appears and consents to the hearing the cause may be heard at an earlier time.

(d) Upon application by such commissioners, or committees, the clerk of the Supreme Court shall issue writs of subpoena *ad testificandum,* writs of subpoena *duces tecum,* or *dedimus potestatem* to take depositions. The commissioners and their committees are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths, and the commissioners shall report to the Supreme Court the failure or refusal of any person to attend and testify in response to any subpoena. The hearings before the commissioners or committees shall be private unless the respondent shall request that they be public.

(e) At the conclusion of a hearing upon any complaint against any attorney before such commissioners or committees, the Board of Governors or Board of Managers, as the case may be, shall, if action by the Supreme Court of any kind is recommended, make report to the Supreme Court of its conclusions of fact and law concerning the complaint, answer, and proof; and thereupon such matters shall stand for hearing and disposition in this court. Such report shall be entered on the docket and entitled in the name of the respondent. Upon the filing of any such report with proof of service of a copy thereof on the respondent in the same manner as briefs are required by rule of the Supreme Court to be served, the respondent therein shall have 10 days from the date of such filing to file exceptions thereto, and shall, within 20 days after the filing of such exceptions, bring to the Supreme Court the record and proofs, or such parts thereof as may be necessary to enable the court to

pass upon such exceptions. The commissioners, upon request of the respondent and payment of the actual cost thereof, shall certify to the court the proofs and record, or such parts thereof as the respondent may designate. With such record the respondent shall file a printed brief and designation of excerpts from record or an abstract as provided in Rules 341, 342, and 344.

(f) Upon the filing of exceptions to such report by the respondent, the Board of Governors or the Board of Managers, as the case may be, shall designate a member of the bar to file such certificates of proof, additional designation of excerpts or additional abstract, and brief as may be deemed necessary fully to advise the court. Such additional designation or additional abstract, if any, and brief shall be filed within 20 days after the filing of the respondent's designation or abstract and brief, and respondent may file a reply brief and excerpts from record in 10 days. The number of excerpts or abstracts and briefs and the manner of their duplication and service shall be governed by Rule 344.

APPENDIX III

IN THE
SUPREME COURT OF ILLINOIS
JANUARY TERM, 1973

IN THE MATTER OF
HARRY PORCYNALEK HUTUL,
AN ATTORNEY.

Before the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Commissioner of the Supreme Court of Illinois. Commissioners Number 1420.

PETITION FOR REHEARING

To The Honorable Justice Of The Supreme Court of Illinois:

Petitioner, Harry Porcynalek Hutul, respondent in the above entitled cause, appearing pro se, respectfully represents that this Court misapprehended the real thrust and impart of this Petitioner's objections to the Commissioner's report in this cause as manifest by the court's decision and opinion herein, to-wit:

I.

First, that this Court, in *People* v. *Hairston*, 46 Ill.2d 348, supports the decisions and positions taken and held by the U.S. Supreme Court in *Ashe* v. *Swenson*, 90 Sup. Ct. 1189, 397 U.S. 436, and *Walter* v. *Florida*, 90 Sup.Ct.1184.

The two Supreme Court decisions were rendered three months *after* certiorari had been denied petitioner herein in *U. S.* v. *Hutul,* 416 F.2d 607. Said decisions deal with the double jeopardy protection guaranteed by the Fifth Amendment to the U.S. and Illinois Constitutions and precede the instant cause by almost two years. Therefore, Petitioner respectfully suggests for reconsideration this contention since the decision herein cites the opinion of the Seventh Circuit Court of Appeals in *U. S.* v. *Hutul,* 416 F. 2d 607, in rejecting the contention in this regard as without merit which aforesaid opinion was rendered September 9, 1969, prior to the aforesaid Supreme Court decisions. Petitioner's contention in this regard, the Court is reminded, is based on the undeniable fact that the State prosecution in 61-2942 and the Federal prosecution (upon which the instant proceedings were instituted) both sounded in fraud and were based on the identical alleged criminally intentional misconduct on the part of Petitioner. The findings in the two prosecutions were diametrically opposed and contradictory with the acquittal in the State prosecution preceding the Federal conviction by *four* (4) years.

II.

Second, the contention in Petitioner's objections to Commissioners' report based on double jeopardy have been misapprehended by the Court in its decision and opinion. The Fifth Amendment protection guaranteed by the Constitution is designed to preclude any person from being tried and/or adjudicated on the same ultimate set of facts more than once since successive prosecutions could never result in proof of innocence otherwise. This court, in the instant cause, is adjudicating Petitioners' conduct and intent for the *third* time, now; after the State acquittal and innocent conclusion reasonably and logically inferred therefrom, in

one instance, and after the diametrically opposite and contradictory conclusion inferred similarly from the Federal conviction. The court's opinion herein manifests affirmation of *only* the conclusions of the ultimate facts inferred and derived from the Federal conviction and ignores the State acquittal entirely in adjudicating Petitioner's conduct and intentions during the same period and involving the same episodes, personnel, exhibits et al. It is clear that this court is the third tribunal judging the aforesaid ultimate facts, overruling the State Criminal Court jury findings and affirming the Federal Court jury findings only. Illogically, this third adjudication and jeopardy overrules the findings of our own Illinois Criminal Court jury and acts as an appeal that reverses those findings of inocence. Plainly, a review and reversal of the State decision on the ultimate issues of fact, as found by an Illinois Criminal Court jury and just as clearly a review and affirmation of the Federal Court jury's findings of fact.

III.

Third, the diametrically opposed findings of acquittal in the State prosecution in 61-2942 in 1962 and the Federal conviction in 64CR408 in 1966 yield alternative conclusions of fact with respect to Petitioner's acts and intent in the involved period and alleged criminal episodes. The instant decision for which rehearing is requested cites again the Seventh Circuit Court of Appeals opinion in *U. S.* v. *Hutul* to infer misconduct and criminal intent which brings the legal profession into disrepute and deserving of disbarment of Petitioner therefore. The State Criminal Court of Cook County findings and conclusions of fact in 61-2942 where Petitioner's acquittal just as logically and reasonably infers innocence of such misconduct and criminal intent in the same identical episodes. The opinions and

decisions in the two prosecutions yield totally incompatibly contradictory conclusions of facts; one of guilt and one of innocence in regard to wrongful acts and intent in allegedly fraudulent circumstances in the involved episodes, without question. The record in the instant cause bares such alternative conclusions, clearly. Petitioner sincerely contends that the resolution of this seeming dilemma to his infinite detriment by this Court's decision and opinion has resulted from his failure to clearly convey and communicate the propositions and true posture of the situation and circumstances herein defined.

IV.

Fourth, the failure to distinguish between Fumo and Petitioner is tragic and unjust. The relative positions of the two parties differs monumentally. Petitioner has successfully defended himself and the profession in charges of fraudulent misconduct and intent in the involved allegedly criminal episodes. Petitioner is still defending the same charges of fraudulent misconduct and intent. The defense against these same charges has been going on for over a dozen years. Such defense by Petitioner should not be misconstrued to manifest a lack of repentance or contrition. No one could be more sorry or saddened by the monument of misery wrought on Petitioner, his family, and his profession by these prosecutions and their attendant circumstances. Once enmeshed in the episodes, professionally, there was no precept to follow for extrication therefrom. Petitioners record herein explains this fully, to-wit: the September 15, 1970 letter of objections to the Commissioners' report and the letter to Judge Lynch of July 30, 1970.

V.

Fifth and of equal import is the matter of appropriate discipline to further the ends of justice in the existent matter before the Court. Justice and mercy walk hand in hand and this Court has repeatedly decreed the ends of justice being rehabilitation rather than merely and only punishment. The record herein clearly and unequivocably demonstrates the tenure of hardship endured by Petitioner, over 12 years, since the indictment in 61-2942 in November, 1961. Every reasoning mind must conclude that official scrutiny and investigation of Petitioner's conduct and intent resulting in such indictment necessarily involved similar intensity in examining the whole of Petitioner's activity, too. Yet, both prosecutors involved only the same identical episodes, occurrences, etc., and no others, neither before nor since that period of time without reservation. That is a period over ten years ago. Petitioner's professional activity is and has been without accusation or blemish this whole time and covers over 2,000 separate and subsequent occurrences and files and approximately 200 jury trials, too. Further and substantive evidence of penalty and punishment is manifest in the record herein of Petitioner's servitude, institutionally, and rehabilitationary evidence is much more manifest in the fact that parole was granted Petitioner into his community with full and complete understanding that such parole was being granted in contemplation of his return to the practice of law therein.

CONCLUSION

It is not Respondent's position that his troubles do not embarrass the Bar; they do, and they will continue to embarrass the Respondent for the rest of his life. The point is that now, thirteen years after a series of events

which resulted in contradictory adjudications, the Respondent faces what may well be his most serious punishment—which is to be administered to what is substantially a different individual from the one acquitted and convicted on certain charges years ago.

The Respondent understands that this Court is the "sentencing court" in this case; it is his point that the sentence of disbarment is too severe under all the circumstances, that his prior acquittal should be considered in mitigation, and that his defense of himself should not be regarded as disrespect or lack of contrition. The Respondent does, therefore, pray for a rehearing at which these points might be considered.

Respectfully submitted,

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Chicago, Illinois 60602
236-0704

APPENDIX IV

IN THE
SUPREME COURT OF ILLINOIS

IN THE MATTER OF
HARRY PORCYNALEK HUTUL,
AN ATTORNEY.

BRIEF OF HARRY PORCYNALEK HUTUL, RESPONDENT

NATURE OF THE CASE

This cause comes on to be heard by this Honorable Court on the Complaint of the Committee on Inquiry of the Chicago Bar Association charging Respondent with being guilty of conduct and practices which tend to bring the legal profession into disrepute in that said Respondent was found guilty by a jury in the U.S. District Court, Northern District of Illinois, Eastern Division, in 64 CR 408 of violations of Title 18, U.S.C.A. §1341, on 9 counts of using the mail to defraud, and Title 18, U.S.C.A., §371, on 1 count of conspiracy to defraud (see Inquiry Exhibit "A", the Indictment, and Inquiry Exhibit "B", the Judgment Orders thereon); Respondent's informal Objections to the Report of the Board of Managers of the Chicago Bar Association sitting as Commissioners of this Court which recommended Respondent's disbarment therefor, to-wit: Respondent's letter dated September 15, 1970 directed to the Chief Justice of this Court relating to Commissioners No. 1420.

ISSUES FOR REVIEW BY THIS COURT

1. Does the prior acquittal of Respondent in the Criminal Court of Cook County in 61-2942 bar or estop a finding or conclusion of guilt of moral turpitude and bringing the legal profession into disrepute in a conviction in the U.S. District Court, Northern District of Illinois, Eastern Division, when the course of conduct and actions and the necessary criminal intent in both prosecutions are the same?

2. Is this Court in any way bound by a finding of innocence of any criminal intent or criminal misconduct in substantially the same course of conduct and actions as set out in the Report of the Committee of Grievance as Commissioners where an acquittal was ordered by the Court and found by the jury in 61-2942 in the Criminal Court of Cook County in 1962 wherein transactions, episodes and all other facts and circumstances are substantially identical including criminal intent to defraud in both prosecutions?

3. Is the conclusive evidence of guilt of moral turpitude and bringing the legal profession into disrepute evidenced by the findings of guilt in the U.S. District Court, Northern District of Illinois, Eastern Division, in 64 CR 408, *mitigated* or *obviated* by the diametrically opposed finding of innocence and acquittal in the Criminal Court of Cook County, Illinois in 61-2942 when both prosecutions involved fraud against the same victim insurance companies, the same personal injury cases, transactions or episodes, the same witnesses and exhibits, substantially?

4. Do the doctrines and principles of collateral estoppel, res judicata or double jeopardy have any application in this Court's adjudication on disciplinary necessity of this Respondent, an Attorney, excepting in determining mitigation or aggravation?

5. Can a Respondent who has defended through two prosecutions for fraud which resulted in diametrically opposed conclusions and findings of fact plead for leniency, mitigation or clemency in this Court's disciplinary proceedings?

RESPONDENT'S POSITION

It is the position of this Respondent that further penalty of discipline by this Court would be the harshest of all the penalties, forfeitures and hardships endured by him in the over dozen years since certain personal injury cases came into his office in 1959.

Respondent was convicted of nine counts of mail fraud and one count of conspiracy to commit a mail fraud as admitted in his Answer to the Complaint of the Committee on Inquiry of the Chicago Bar Association and was sentenced to serve 5 years in the custody of the Attorney General. Respondent served 630 days in the Federal Correctional Institution at Sandstone, Minnesota in the execution of that sentence prior to being paroled on January 6, 1972. Respondent's professional activities were, therefore, suspended totally during that period and most substantially and considerably limited theretofore and since that period.

The contradiction of the findings of the two prosecutions involving the same personal injury occurrences, parties, insurance carriers, witnesses, exhibits create a dilemma for Respondent and has been an absolute hardship. The most horrendous consequence of this dilemma would be further disciplinary action by this Court in these proceedings in disbarring him from the practice of law or suspending him further.

Case law precedent in proceedings of this nature, disciplinary hearings, in this Court conclusively prescribe and establish that this Court will not go behind the record of a Respondent's conviction other than to see what mitigation or aggravation exists in such record to provide a full and fair hearing. Yet Respondent sincerely feels that this is a singular and peculiar situation with the aforesaid dilemma of diametrically opposed findings in the two prosecutions involving the same type of offenses, fraud, material and personnel. This is especially significant when a criminal court in Cook County, Illinois found by the Court's direction of acquittal on the charge of obtaining money by means of a confidence game in 61-2942 and the jury's finding of not guilty, acquitting Respondent of obtaining money by use of false pretenses and conspiracy to defraud pre-exists the conclusive evidence of guilt prescribed and established by the U.S. District Court jury's findings of guilt in using the mails to defraud and conspiracy to do so.

The State Court findings conclude no criminal intent or misconduct; the U.S. District Court concludes criminal intent and misconduct; this Court must adjudicate the same conduct or misconduct, again, even if it is only in mitigation or aggravation, for the third time.

POINTS AND AUTHORITIES

I.

RESPONDENT'S COURSE OF CONDUCT, ACTIONS AND INTENTIONS ARE BEING ADJUDICATED AGAIN CONTRARY TO THE PROVISIONS, DOCTRINES AND PRINCIPLES OF COLLATERAL ESTOPPEL, RES JUDICATA AND DOUBLE JEOPARDY WHERE THE OFFENSES FOR WHICH HE WAS TRIED IN THE TWO SEPARATE PROSECUTIONS TRIED IN THE TWO SEPARATE PROSECUTIONS ARE SUBSTANTIALLY THE SAME, FRAUD IN BOTH.

Ashe v. *Swenson,* 90 Sup. Ct. 1189, 397 U.S. 436 (1970).

Blockburger v. *U.S.,* 284 U.S. 299, 52 Sup. Ct. 180.

People v. *Hairston,* 46 Ill. 2d 348.

Waller v. *Florida,* 90 Sup. Ct. 1184, 397 U.S. 387 (1970).

People v. *Golson,* 384 U.S. 1023, 32 Ill.2d 398.

Tehan v. *U.S.,* 383 U.S. 931, 86 S.Ct. 925.

II.

THE COURT WILL REVIEW AND GO BEHIND THE RECORD OF CONVICTION TO CONSIDER THE FACTS AND CIRCUMSTANCES IN AGGRAVATION OR MITIGATION IN EACH CASE IN DETERMINING THE PENALTY TO BE IMPOSED ON DISCIPLINARY PROCEEDINGS IN THE INTEREST OF SUBSTANTIAL JUSTICE TO RESPONDENT.

In re Sullivan, 33 Ill. 2d 548, 59 A.L.R. 2d 1398.

In re Shavin, 40 Ill. 2d 254.

In re Damisch, 38 Ill. 2d 195.

In re Crane, 23 Ill. 2d 398.

In re Anderson, 370 Ill. 2d 515, 522.

In re Lacob, 278 N.E. 2d 795.

In re Gartland, 47 Ill. 2d 177.

In re Reynolds, 32 Ill. 2d 331.

In re Cohn, 10 Ill. 2d 186.

STATEMENT OF FACTS

The Pleadings

On July 10, 1968, a Complaint was filed by the Committee on Inquiry of the Chicago Bar Association alleging that on June 24, 1966, the Respondent was found guilty of devising a scheme to defraud and obtain money in violation of Section 1341 of Title 18 of the United States Code on nine (9) of fifteen (15) counts charged in the Indictment, 64 CR 408, in the U.S. District Court, Northern District of Illinois, Eastern Division, and was further found guilty of one count of conspiracy to violate the above-stated section in violation of Section 371 of Title 18 of the United States Code, as charged therein; that on August 12, 1966 the Respondent was sentenced to five years in the custody of the Attorney General and further said Complaint charged that Respondent's conduct involved moral turpitude and had been guilty of misconduct and practices of moral turpitude which brings the legal profession into disrepute. Respondent admitted the conviction and sentence, but denied misconduct, moral turpitude and bringing disrepute to the legal profession.

In the course of the hearings the Indictment, aforesaid, was admitted as Inquiry Exhibit "A"; the Judgment Order in the U.S. District Court was admitted into evidence as Inquiry Exhibit "B"; the Decision of the Seventh Circuit Court of Appeals was admitted into evidence as Inquiry Exhibit "C"; and Respondent's Petition for Writ of Certiorari to the Supreme Court was admitted into evidence as Respondent's Exhibit "1".

Subsequent to the hearing before the Bar Association Grievance Committee, the Supreme Court issued its mandate on January 12, 1970 denying certiorari.

Respondent, thereafter, filed his motion to strike his name from the roll of attorneys to which objections were filed and closed his offices thereafter preparatory to begin the execution of the sentence of five years and, therefore, did not appear further before the Grievance Committee or the Board of Managers.

The Report of the Grievance Committee of the Chicago Bar Association sitting as Commissioners of the Supreme Court recommending disbarment of the Respondent was filed with the Court. Respondent received notice thereof and filed a letter on September 15, 1970 objecting to the Report and Recommendations, informally, since he was at the Federal Correctional Institution at Sandstone, Minnesota serving in the execution of that sentence imposed in that case.

Nature of the Evidence

Proof of Committee on Inquiry. The Chicago Bar Association through its counsel offered the aforementioned evidence, to-wit: The Indictment, Exhibit "A", the Judgment and Commitment Order, Exhibit "B" and the Decision of the Seventh Circuit Court of Appeals, Exhibit "C" and rested its case against Respondent.

Proof of Respondent

Respondent testified over his objections to the entire proceedings since the Petition for Writ of Certiorari had not been ruled on as yet and on the advice of his counsel in that criminal case. Respondent's Exhibit "1" was admitted into evidence, the Petition for Writ of Certiorari to the Supreme Court of the United States, as aforesaid. Then, subject to his continuing objection, Respondent was sworn and testified. Respondent requested that judicial notice be taken of the proceedings and record in 61-2942.

Further that judicial notice be taken of the insurance companies, witnesses and exhibit evidence involved in 61-2942 and pointed out that both 61-2942 and 64 CR 408 involved the same subject matter, exhibits, witnesses and the Judgment of acquittal rendered on July 3, 1962.

Further, in the Transcript of Proceedings on December 11, 1969 before the Committee on Grievances, pages 40 thru 44, Respondent testified to the identical character of the evidence and offenses in both prosecutions, and, on page 45 beginning at the bottom and on page 46, Respondent attested to his good faith.

Thereafter, on cross examination, Respondent recited the factual circumstances surrounding these identical offenses, especially with respect to the evidence which is summarized in the Commissioner's Report and as quoted from the Decision of the Seventh Circuit Court of Appeals.

There was a Stipulation that the testimony of the seven witnesses in the U.S. District Court and of a similar number of witnesses in the State Court would be incorporated by reference in that Transcript of December 11, 1969, as witnesses to Respondent's good character.

Findings and Recommendations

Division IV of the Committee on Grievances of the Chicago Bar Association sitting as Commissioners of the Supreme Court of Illinois pursuant to Rule 751 of the said Court found that:

> "the conviction of the Respondent, Harry Porcynalek Hutul, has brought the legal profession into disrepute"

and recommended that said Respondent be disbarred from the practice of law.

ARGUMENT

I.

RESPONDENT'S COURSE OF CONDUCT, ACTIONS AND INTENTIONS ARE BEING ADJUDICATED AGAIN CONTRARY TO THE PROVISIONS, DOCTRINES AND PRINCIPLES OF COLLATERAL ESTOPPEL, RES JUDICATA AND DOUBLE JEOPARDY WHERE THE OFFENSES FOR WHICH HE WAS TRIED IN THE TWO SEPARATE PROSECUTIONS ARE SUBSTANTIALLY THE SAME, FRAUD IN BOTH.

A.

Respondent has no quarrel with the whole history of case precedent law that sets out the principle:

> "conviction of a crime involving moral turpitude is to be regarded as conclusive evidence of guilt and grounds for disciplinary action. The record of conviction is deemed conclusive of guilt and we will not go behind that Record."

as repeated as late as 1970 *In re Gartland,* 47 Ill. 2d 177. Nor is there any dispute that conviction of the crime of fraud by use of the mails involves moral turpitude and that such conviction may be sufficient grounds for disbarment or other disciplinary action as stated in *In re Needham,* 364 Ill. 65, 1936.

Certainly an attorney convicted of practices and a course of conduct that results in a fraud conviction is guilty of moral turpitude and brings the legal profession into disrepute. Such finding by a Court of competent jurisdiction should rightfully be conclusive evidence. The di-

lemma that arises especially, singularly and peculiarly in this case is that the same course of conduct and practices that this Court is called upon to consider by way of mitigation or aggravation in imposing the penalties recommended by the Bar Association in the instant proceeding or for such lesser disciplinary action as the Court may deem meet is identical and substantially the same for which said respondent was acquitted by the Criminal Court of Cook County, Illinois and a jury in that Court in 1962, in 61-2942. This Court in *People* v. *Hairston*, 46 Ill. 2d 348 has taken the position, in support of *Ashe* v. *Swenson*, 90 Sup. Ct. 1189, 397 U.S. 436, which upholds the collateral estoppel proposition, principle and doctrines, which decision stated, at page 360:

> "That when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the parties in any future law suit."

This doctrine, as well as double jeopardy, "protects a man who has been acquitted from 'having to run the gauntlet' a second time". This Court will follow the rule:

> "In law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same set of facts"

as set forth in *State* v. *Baird*, 93 P.2d 409 cited in the *Hairston* decision. This Court has held, therefore, in the *Hairston* decision, that verdicts that are legally consistent need not be logically consistent. Therefore, legally inconsistent verdicts require a new trial in this State.

In *Waller* v. *Florida*, 90 Sup. Ct. 1184, the Supreme Court of the United States held that there is no dual sov-

ereignty provisions between municipalities and the State since the municipality derives its authority from a State charter or grant. It is, therefore, logically consistent that since the Federal government derives its authority, likewise from grants from the State that the dual sovereignty prescription set out by the Seventh Circuit Court of Appeals in its opinion in reviewing the Respondent's conviction in 64 CR 408 is similarly effected.

Certainly the State prosecution in the Criminal Court of Cook County in 61-2942 establishes conclusively that the same offenses and their necessary elements were being tried as in the U.S. District Court prosecution when the Court examines the list of witnesses at pages 85 through 106 of the Common Law Record in *People* v. *Hutul,* 61-2942, which has been filed as part of the Record in this Cause No. 43292 as well as the supplemental list of witnesses on pages 107 through 111 therein. That list of witnesses includes each, all and every person, persons or entities who had anything to do, whatsoever, with the nine (9) personal injury accidents which were and are the subject matter of both prosecution and this hearing too. For from those witnesses, including the Respondent's own clients, allegedly, every exhibit, every statement and any and all evidence was produced or could have been produced in the State Court prosecution, 61-2942, all or most of which was produced and then again in the District Court prosecution for mail fraud and conspiracy.

Respondent, therefore, facing charges of fraud in both prosecutions with diametrically opposed results was acquitted and found innocent in the State Court prosecution, 61-2942, and was found to have perpetrated no misconduct in making false pretenses or misrepresentations nor having the necessary criminal intent to convict for fraud.

The elements of fraud in both prosecutions are, therefore, the same and the offenses can only be determined to be the same. All the documents or exhibits which were the Count documents of the Indictments in 64 CR 408 were placed in evidence in 61-2942 and patently manifested their transmittal by U.S. mail. No additional facts or evidence were necessary in the prosecution of either offense in substance or in fact. Therefore, *Golson* v. *People*, 32 Ill. 2d 398, 86 Sup. Ct. 1951, 384 U.S. 1023 is truly applicable "when prosecutor knows of all claims and does not join all" the respondents should be exculpated from the necessity of doing so.

The principles stated in *Tehan* v. *U.S.* (383 U.S. 931, 86 S.Ct. 925) that without the finality of one jury verdict, no procession of juries can acquit effectively but one jury can convict. The prosecutor can keep trying until he finds a jury panel to accommodate a conviction and witnesses from the first trial or trials can become educated to the successful defense, necessarily. The decision in the *Ashe* v. *Swenson* case, 90 Sup. Ct. 1189, 397 U.S. 436, is certainly applicable when the Court in that case stated:

> "If evidence in the original trial shows no specific intent or other elements then no other prosecution that requires the showing of that same specific intent or other elements should be allowed."

The "same evidence, criminal episode or transaction" tests spelled out in the dissents in the *Ashe* decision apply favorably to Respondent's position with respect to the two prosecutions related herein.

II.

THE COURT WILL REVIEW AND GO BEHIND THE RECORD OF CONVICTION TO CONSIDER THE FACTS AND CIRCUMSTANCES IN AGGRAVATION OR MITIGATION IN EACH CASE IN DETERMINING THE PENALTY TO BE IMPOSED ON DISCIPLINARY PROCEEDINGS IN THE INTEREST OF SUBSTANTIAL JUSTICE TO RESPONDENT.

A.

This Court in recent cases as set out in the *"Points and Authorities"* herein as stated in *In re Needham,* 364 Ill. 65 that:

> "The record in conviction of Respondent is conclusive of his guilt and it has been established in this State that we cannot go behind such record."

In re Sullivan, 33 Ill. 2d 548, the Supreme Court said at p. 554:

> "We come then to a consideration of the discipline to be imposed, a determination which involves an appraisal of Respondent's actual conduct (*In re Crane,* 23 Ill. 2d 398, at 400; *In re Anderson,* 370 Ill. 515, at 522) in addition to the fact of conviction, and properly includes all factors of both an aggravating and mitigating nature."

In re Lacob, 278 N.E. 2d 795 (Jan. 28, 1972) the Court said (p. 796):

> "The first purpose of a proceeding as this is to safeguard the public, maintain the integrity of the profession and to protect the administration of justice from reproach. (*In re Gartland,* 47 Ill. 2d 177, 265 N.E. 2d 148). This Court will consider the aggravating or mitigating circumstances in each case. (*In re*

> *Shavin*) to determine a sanction which is suitable to serve this primary purpose and which is appropriate to impose upon the offending attorney."

In re Crane, 23 Ill. 2d 398 (1961) the Supreme Court said (pp. 400-401):

> "While the conviction is conclusive evidence of guilt, it does not preclude the consideration of other evidence for the purpose of determining the appropriate disciplinary action. After all, a respondent is being disciplined not because of his conviction but because of his conduct. The actual conduct itself is certainly relevant to a determination of the appropriate discipline would be accorded just as every conviction of a crime does not require the same punishment, so all convictions of crimes involving moral turpitude do not require the same discipline. Thus, a consideration of the actual conduct of the respondent is not only proper, but may be indispensable, to an informed appraisal of the appropriate disciplinary action."

Therefore, there is no question that this Court must adjudicate Respondent's actions and course of conduct again during the period in question in the two prosecutions as well as prior and subsequent thereto.

The evidence presented to this Court in this Record aptly displays the tenure of hazard that Respondent has endured. The first personal injury accident happened on or about March 23, 1959, the last of the nine happened on or about July 5, 1959. The suspicious circumstances of those occurrences arose almost immediately and from that time until now, even, the consequences, jeopardy and hazards have shadowed Respondent's existence completely and totally in all aspects of his living experience: domestic, economic, professional and social.

The criminal innocence determined in 61-2942 in 1962 could not preclude disciplinary action by this Court if

the actions, course of conduct and intent were morally turpitudinous and brought the legal profession into disrepute of that there is no dispute. Certainly, the world at large was made fully aware of the allegations of fraud in that first indictment on the personal injury cases in point by the monument of front page publicity attendant to the return of same in 1961. This tribunal and the Complainant herein, in the instant proceedings, were just as certainly made aware thereby that Respondent's actions and intentions were suspect, at least, then and there, without doubt. At that same point in time, Respondent's life just as surely disintegrated, you can easily understand, in all his living aspects, as aforesaid.

Yet, no action for discipline was instituted until 1968, over two years after the second prosecution finally resulted in Respondent's conviction in 64 CR 408, and over six and one-half years after the charges of criminal misconduct and intent were initially made in 61-2942, with the acquittal in 1962 in that first prosecution. These time intervals are only significant, and monumentally so, when this Court considers the disaster wrought by these two prosecutions, the attendant diminution of all Respondent's resources in their defenses and the resultant hardships endured throughout the entire period of time, until today and these proceedings, now almost eleven years since the first indictment, and the destructive publicity attending it.

The doctrines and principles of collateral estoppel, res judicata or double jeopardy do have application in this Court's adjudication on disciplinary necessity of this Respondent, an attorney, especially in determining mitigation or aggravation.

This Court's adjudication in the instant disciplinary hearing is the third adjudication of Respondent's conduct during a period covered by the indictment in 61-2942 in

the Criminal Court of Cook County, Illinois, and 64 CR 408 in the U.S. District Court, Northern District of Illinois, Eastern Division.

Can a respondent who has defended through two prosecutions for fraud which resulted in diametrically opposed conclusions and findings of fact plead for leniency, mitigation or clemency in this Court's disciplinary proceedings?

The Record as now completed by Respondent's filing herein manifests this Respondent's defense against charges of any fraud in both State and Federal Courts of any kind whatsoever by misconduct or intent. His testimony, as the Transcript filed herein shows, leaves this Court no alternative but to decide whether Respondent lied when he claimed innocence therein if a decision adverse to him is rendered herein. The determination or adjudication in these disciplinary proceedings which are based on the criminal conviction sounding in fraud in the U.S. District Court Case, 64 CR 408, must ignore the findings in 61-2942 in the Criminal Court of Cook County, Illinois. The logical inevitability of concluding these hearings adversely to Respondent is patent if this Court fails to account for and accommodate the State Court's findings of innocence of fraud, intent and misconduct during the period of time and surrounding the nine cases in both prosecutions.

The purpose and design of the disciplinary proceedings by this Court has been traditionally to insure the highest standing and reputation of the bar in the eyes of the public, to safeguard the public, maintain the integrity of the profession and to protect the administration of justice from reproach. The imposition of disciplinary measures has been said to correct a delinquent and to serve as a deterrent to others, hopefully.

Respondent has endured impending disaster, humiliation, degradation, 630 days of incarceration and constantly impending threat of this final penalty, disbarment, for 13 years now. Respondent can think of no greater deterrent or discipline. Reviewing the recent cases and briefs wherein other respondents in similar proceedings have expressed contrition, repentence and rehabilitation for their confessed misconduct leaves little hope even in the light of Respondent's constancy in maintaining his innocence, even unto preparation of a post conviction collateral attack on the sentence and conviction in 64 CR 408 as provided by Section 2255, Title 28 United States Code. Any amelioration in this Court's consideration on the Bar Association's recommendations for disbarment must come from the consideration of this Respondent's whole life. That the two prosecutions arose out of the same nine personal injury cases, the same course of conduct and intent, the same witnesses and exhibits and NOT in any other cases of any kind whatsoever is one fact that could mitigate in Respondent's favor for this Court has certainly been made aware by Respondent's informal objections to the recommendations, in his letter of September 15, 1970, that all of his cases were investigated thoroughly by the motivating factors involved in both of those prosecutions especially after Respondent's successful defense in 61-2942. I feel that is a reasonable, logical and inescapable conclusion. My position and argument is more fully set out in my informal letter in the nature of a Rule 35, Motion and Petition to Judge Lynch supplied for the Record dated July 30, 1970.

Respondent's parole is additional positive evidence of character and fitness, likewise, for this Court's consideration on the issue of mitigation. Parole was granted to Respondent after serving 21 days over the minimum time necessary on his sentence under Federal Rules. Said pa-

role was also granted with full accommodation of Respondent's express plans to continue the practice of law in this community, if permitted by this Court in these proceedings which were then pending, and of which the Parole Board was fully advised.

CONCLUSION

For all of the aforesaid reasons, Respondent respectfully submits this Brief for this Court's judicial consideration.

Respectfully submitted,

HARRY PORCYNALEK HUTUL
Respondent, Pro Se

APPENDIX V

UNITED STATES OF AMERICA
STATE OF ILLINOIS)
) ss.
SUPREME COURT)

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the twelfth day of March in the year of our Lord, one thousand nine hundred and seventy-three, within and for the State of Illinois.*

Present: Robert C. Underwood, *Chief Justice*

Justice Walter V. Schaefer

Justice Daniel P. Ward

Justice Joseph H. Goldenhersch

Justice Thomas E. Kluczynski

Justice Charles *H.* Davis

Justce Howard C. Ryan

William J. Scott, *Attorney General*

Robert G. Miley, *Marshal*

Attest: Justin Taft, *Clerk*

BE IT REMEMBERED, that, to-wit: on the 20th day of March, A.D. 1973, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:

No. 43292

Harry Porcynalek Hutul, an Attorney

Information 1420

And now, on this day, the Court having duly considered the Report of Commissioners, and exceptions thereto, together with the briefs filed hereinfi and being fully advised in the premises;

IT IS HEREBY ORDERED that respondent, Harry Porcynalek Hutul, be disbarred.

I, Justin Taft, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 14th day of June A.D., 1973.
(SEAL)

/s/ *Justin Taft*
Clerk
Supreme Court of the
State of Illinois.